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Supreme Court of the U

October Term, 1934

No. 16

COMMONWEALTH OF VIRGINIA,

vs.

IMPERIAL COAL SALES COMPA

Reply Brief in Behalf of the C
of Virginia

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vs.

IMPERIAL COAL SALES COMPANY, INC.

Reply Brief in Behalf of the Commonwealth of Virginia

There are two new points raised in the brief of counsel for the respondents—the one, that the instant case presents a moot question because, they say, the Virginia "court has strongly intimated, if not actually decided, that the tax in question does not under the Virginia statutes apply to this company." (Brief of Respondent, p. 2); and the further startling one, that the State of Virginia has not been affected by the decision and has therefore no right to raise the constitutional question. (Brief of Respondents, pp. 5, 6 and 7.)

FIRST: AS TO THE STATE CONSTRUCTION OF THE TAXING STATUTE

The opinion of the court, after disposing of the income question, goes on as follows (R. p. 50):

> "We now proceed to the capital tax. The view we have taken of the capital tax is that in any event it is invalid because it contravenes article 1, sec. 8, subsec. 3, of the Constitution of the United States, and therefore it becomes unnecessary to pass upon the construction of section 73 of the Tax Code under which the assessment was made. However, it is necessary to refer to the statute which in part is in this language:"

Then follows some references to and quotations from section 73 of the Tax Code, and "in passing" a reference to section 427 of the Tax Code, and after rendering its decision in the following manner (R. p. 52):

> "However, we prefer to rest the decision of the validity of the capital tax here considered upon the broad proposition that it is invalid because it is a burden upon interstate commerce and forbidden by the Constitution of the United States."

it proceeds to defend its position by a discussion of cases and refers no more to an interpretation of section 73 but concludes by saying (R. p. 59):

> "Many other cases may be found in which state taxation in relation to interstate commerce is discussed, but we deem it unnecessary to prolong the

discussion. After a consideration of those we have examined, we are of opinion that, where a capital tax under section 73 of the Tax Code is sought to be imposed upon a person, firm or corporation, which is doing no intrastate business, but is doing solely an interstate business, and has no appreciable real or tangible personal property in this state, the tax is invalid because it is a burden upon interstate commerce and contravenes article 1, sec. 8, subsec. 3, of the Constitution of the United States."

It is, therefore, respectfully asserted by counsel for the Commonwealth of Virginia, that the Virginia court has decided, after full argument, and with deliberation, that the Virginia tax statute applied and that it was in violation of art. 1, sec. 8, cl. 3 of the United States Constitution and that the question is not a moot one, but is real and of material consequence.

SECOND: AS TO THE INJURY TO THE COMMONWEALTH OF VIRGINIA BY THE DECISION

Suffice it to say as to this, as was said in greater detail in the petition for a writ of *certiorari*, that Virginia is denied $1,579.69 of her revenue from the instant tax, and will be deprived of other taxes in subsequent years from this and other companies if the decision stands, and she, therefore, has been injured, has been directly affected, and has been deprived of her rights.

None of the cases cited on pages 6 and 7 of the brief for respondent are applicable here. Their soundness is

admitted, but it appears from the facts of each that the absence of injury to the complaining party was conspicuous there, while real, direct injury to Virginia is clearly shown to exist in this case.

OTHER STATEMENTS MADE BY COUNSEL FOR RESPONDENT

In their brief, there are several statements of fact and law that should not be passed unnoticed although counsel for the petitioner deem them to be more or less immaterial.

On page 8 of their brief, they say, "that the record shows that the company has for years been assessed with a tax on its money in bank and has paid such tax each year and though the statutes here involved have been in effect for years there has never before been any attempt to assess such a tax as is now involved."

The only thing in the record bearing upon the whole statement is found on page 19 of the record, where the following question and answer were allowed to remain in the record over the objection of counsel for the Commonwealth:

> "Q. Has there been any taxation on your capital up to the year 1930 by the State of Virginia?
> "A. No, it has never been taxed before * * * ."

and on pages 43 and 44 of the record, where it appears that in the assessments for the years 1928, 1929 and

1930, the Department allowed a credit for the tax already assessed upon money. This only relates to the treatment of this particular corporation with respect to only three years' taxes and is entirely different from any evidence of an official administrative ruling and interpretation of years' standing and does not bring this case within the rule that the practical interpretation placed on statutes by administrative bodies over a period of years should be given great if not controlling weight.

Again, on page 10 of their brief, counsel for respondent seem to consider it odd that counsel for petitioner consider a lease on a wharf as intangible property and they aver, without support of authority, that "a lease is an interest in real estate and leases are classed and taxed as real estate."

To the contrary, is the view of this Honorable Court as expressed in *Freeman, Trustee,* v. *Dawson,* 110 U. S. 264, where on page 270 it is said:

> "By the common law, a leasehold interest in land is personal property."

And likewise to the contrary is *Minor, on Real Property,* (First Edition), Section 357, page 424, where it is said:

> "Estates for years are chattels real, and upon the death of the owner intestate, go to his personal representative, and not to his heir * * *."

and still stronger authority is section 5 of the Code of Virginia, (Michie's Code of Virginia, 1930, section 5, tenth) where among the rules of construction and definitions is found the following:

> "* * * * The words 'personal estate' shall include chattels real and such other estate as, upon the death of the owner intestate, would devolve upon his personal representative."

The last statement to be challenged is the one found on page 14 of their brief where counsel for the respondent says:

> "Such cash and assets were in fact the direct proceeds of interstate commerce, in effect the gross receipts of such commerce with no deductions except bills and accounts payable and which this court has said in many decisions are not subject to State tax."

Opposing counsel belittle the deduction of accounts and bills payable and appear to argue that the tax is in effect a tax on gross receipts which, under the other facts herein, would be void; but a tax on money in bank and the excess of receivables over payables is more nearly a tax on net receipts than a tax on gross receipts.

CONCLUSION

For the reasons shown above and in our first brief it is respectfully submitted that the motion to dismiss the

writ of *certiorari* should be overruled and the decision of the lower court should be reversed.

Respectfully submitted,

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Richmond, Virginia,
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